

## TACTICS, STRATEGY, AND MARRIAGE EQUALITY\*

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Thank you for having me. I'm going to focus my remarks today on being tactical. As law students, hopefully you will all go into the social justice field and go on and do great things for everyone, but frankly a lot of what I'm going to talk about in these couple of minutes will be as relevant for almost any set of litigation or legal problems that you have, almost any kind of high-profile cases.

My firm has done LGBT work for many years. I personally have been involved in the movement for many years too, back to the AIDS crisis where Urvashi Vaid and I were lobbyists on the Hill together getting federal funding, and later, I ran the campaign to stop the federal marriage amendment that George Bush had proposed for our federal constitution. But last year really was a huge highlight for me and for us as a firm. We ran the media operation for a coalition of organizations that came together knowing we were going to have two cases before the Supreme Court on marriage at the same time that the country was exhibiting a little bit of unease about whether or not we were ready to go to the Court. And so the groups, under the leadership of Evan Wolfson at Freedom to Marry and Chad Griffin at the Human Rights Campaign and Mary Bonauto at Gay & Lesbian Advocates & Defenders and James Esseys at ACLU and Adam Umhoefer at the American Foundation for Equal Rights, all got together and said, we ought to coordinate this.

So when we got together we thought—what do you need to do to create a media campaign around a case that's going to the Supreme Court? And we started with five principles.

The first principle was that our challenge from a media perspective wasn't going to be about making the legal case. Instead, our challenge was really going to be to create an environment that showed that the country was ready for the Justices to come to the right

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decision. So you know, Justices are humans, and they read the newspaper and they go to cocktail parties and they have debates within their safe communities about social issues. And so we knew that the biggest issue to potentially confront them was: Will the Court be moving ahead of the people? And courts don't really like to often move ahead of the people. So we had to prove the country was ready.

The second was—this is a court. It's not a public entity of elected officials. So direct lobbying, externally, in the media and in other places is unseemly. We had to have a level of respect in our public education campaign that recognized that the Justices, whatever decision they came to, were purely going to be about the law, because there's never any politics. Never any personal views going into a judicial interpretation. [Laughter in audience] All decisions are really strictly based on the law. [More laughter] So we had to go along with that farce as we conducted our respectful campaign.

Third—there are a lot of political efforts going on in the states, where electoral bodies are considering these issues, and we had to make sure that whatever work we were doing around the court cases furthered that work. That we were working in concert with it.

Fourth—we had to make sure that everybody in this very crowded field felt respected. There were a lot of organizations, there were a lot of local groups; people had been fighting to support these issues for many, many years. We had a panoply of experts. And we had to make sure all people and all groups felt engaged and were cooperating and were respectful of each other. As you know, sometimes in social justice movements, that's the first rule that fails. Maybe you don't know that, but you should learn that.

And finally—and perhaps most importantly, I say to a room full of lawyers, not being a lawyer myself—do no harm. Like, don't fuck up the case. Don't put forward arguments with a reporter that a Justice is going to read and screw it up. I see James Esseks in the room today. He and Robbie Kaplan were very good at pushing on me when he thought I was doing that on the *Windsor* case, which was helpful and I'm grateful for it.

Let me give just a couple of points in terms of tactics. Obviously, a large coalition of interests helps on any case—as many people as you can get into your space, including unexpected people. We did a lot of research. We tested our messages. These issues of LGBT rights and marriage have been around for years. Everybody thinks they know what works, but we were going to a new place and we needed to know not just what did people think about same-sex marriage. We needed to know what people thought the Court's role was in same-sex marriage. What do people think that a judicial decision would bring to this issue?

And so we did a whole new round of message development and testing around those issues.

The sidenote to this is that there has been a shift in messaging around marriage over the years. It started very early around equal rights and equality, and shifted to the more successful messages of later years that focused on love and commitment and values and family. So we knew that piece of it, but we needed to know what society felt the role of the courts was going to be. Materials were then developed around that. We were recruiting and training real people to share real stories—mothers and fathers and children and families, people of faith, military leaders, Republicans, child experts—as many different surrogates as possible. We were working with these groups to identify, media train, and have them ready for our operation.

For the media itself—there were a couple of phases, as there are with any big case. There's the set-up, which is—how long do you have for the curtain raisers? In this case we had a couple of months after they announced they were going to take a case before the hearing actually happened. So we had a methodical education process that we had to do in the media.

Then you have the hearing. Obviously there was a significant amount of rallies and things like that on the courts steps and surrounding areas on hearing day. We worked very hard to make sure that those were peaceful and loving and supportive as opposed to hostile and disruptive and confrontational. We wanted to make sure that the media covering the Courthouse steps saw our side as the side that was advocating for love. The truth is that in the court of public opinion, putting on a show on the steps of the Court during important arguments is pretty important. Obviously the media can't bring cameras inside, so they try to tell the story of the case via the actions and interviews they do outside the Court that day. It was our job to make sure that the story that was being told was the right one—one consistent with the arguments being made inside and with messages that promote our goal of preparing the country for marriage equality.

Then you have the phase of anticipating the ruling, and then you have the decision day. How do you create an affirmation around the decision that's going to happen? Mary Bonauto was brilliant at organizing the amici in both of those cases, so we used a lot of the surrogates that came out of those amici to highlight different messages each week: faith communities, military families, child experts, financial issues, etc.

Social media is a key part of the work. We also did regular events. We never let a reporter want for an idea. We gave them something every other day for like a seven-month

period, because we just couldn't afford to have the strays. Whether that's making sure we were on the phone with producers or bookers or reporters every single day—what are you doing, what's the story, how about this person, have you thought about this angle. That includes columnists who we were targeting, whether they were conservative columnists or progressive columnists. We heard that maybe Justice Ginsburg thought that *Roe* moved too quickly. That created three weeks of work to make sure that we had the right people talking about *Roe* in the right way. We bought advertising in the print outlets that we'd heard John Roberts and Antonin Scalia read, and in the broadcast outlets where we suspected TV viewing might occur. We talked with editorial boards, and we went local, local, local. We had plaintiffs, but we also had lots of surrogates. We talked to media where Justice Kennedy grew up in Sacramento, California, and the local community newspapers of the Bronx. We hit as specific targets as we could, targeting each Justice along the way. Again, respectful. Thoughtful. Not too direct. But making sure that it was a comprehensive sweep of the public messaging.

Those kinds of things have been critically important, even in the last two days where there was a victory in a marriage case [in] Virginia.<sup>1</sup> What's the first thing you do? You've got to call the *Richmond Times Dispatch*, the most conservative paper in Southern Virginia, to make sure their editorial is the right one. It affirms what the court did. You can't always predict what the court is going to decide, but if you missed the "pre-buttal" opportunity, go for an editorial to affirm a court decision because you don't want a whole bunch of politicians out there trying to undo something good. Same in Texas with the marriage victory in court there.<sup>2</sup> You've got to go immediately to the most conservative columnists, affirm what the court did, interpret it for the people. The media is really the people's interpretation of the courts, and you must treat it as such.

***In response to questions about the generational aspect of the work, movement priorities, and connections across reproductive rights and marriage equality work, Hilary Rosen added:***

I'll also address questions about reaching youth for a moment because I worked in the music business for many years and founded Rock the Vote. And I've done a lot of work around messaging to young people. It is true that young people overwhelmingly support the freedom to marry. It is not true that young people have become more conservative around personal freedom issues.

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1 Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014).

2 De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014).

You know, there is a division that conservatives have tried to put into this. Because young people are actually registering to vote about one-third Republican, one-third Democrat, and one-third Independent. So the increase for young people is really in Independents, not really in Republican or Democrat or pro-choice or anti-choice. So to get a message across, it's very much an issue of—is there a credible threat? Is there something that they can connect to?

And I do think that we need to find some ways to catch the media up to the current conversation about choice. Because as much as everybody thinks that the media loves really nice stories, and you know they love human-interest stories and the like, media operates on conflict. What we have seen in the choice areas is a really good example—take the conflict in the last election. You had Mourdock in Indiana and Todd Akin getting attacked on rape issues.<sup>3</sup> Every time there was conflict around this issue, voters did the right thing. When there's not a conversation about it—voters are left to their own devices, people are left to their own devices—they're not engaged. So, in some respects, part of this work around choice involves reengaging the conversation in a different way that allows people to come back into it. And I'm not sure that that's been done effectively enough.

The one piece I'll add about the future of the movement is about chipping away—are we worrying enough about LGBT equality and marriage rights being chipped away? I think we're getting smarter about cutting it off and finding allies to do it. My guess is that it's going to be harder, once marriage rights are established, to chip away at those rights the way the reproductive rights movement has experienced, just because there are so many elements to be chipped on the reproductive rights side, and more medical decisions and more places to go with it. I'm confident on the LGBT issues that we're going to have two or three of these attempts at religious freedom exemptions. We're going to beat them with a lot of work, and then I think we're moving on.

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3 See Annie Groer, *Indiana GOP Senate hopeful Richard Mourdock says God 'intended' rape pregnancies*, WASH. POST (Oct. 24, 2012 11:44 AM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2012/10/24/indiana-gop-senate-hopeful-richard-mourdock-says-god-intended-rape-pregnancies/> [http://perma.cc/F5DF-LZJK]; John Eligon & Michael Schwartz, *Senate Candidate Provokes Ire With 'Legitimate Rape' Comment*, N.Y. TIMES (Aug. 19, 2012), <http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html> [http://perma.cc/JQ3H-FAUW].